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AUG 02 2023

CLERK OF THE COURT

THE SENATE OF THE STATE OF TEXAS
COURT OF IMPEACHMENT

IN THE MATTER OF
WARREN KENNETH PAXTON, JR.

ATTORNEY GENERAL WARREN KENNETH PAXTON JR.'S MOTION TO EXCLUDE EVIDENCE GATHERED IN VIOLATION OF LAW

By impeaching Ken Paxton, the House seeks to remove the sitting Attorney General of the State of Texas, a public servant who has been repeatedly elected by the people of Texas. It has been a century since the last such effort involving a state-wide official. Given the gravity of these proceedings, Texans should expect that the architects behind this impeachment would have conducted their investigation accordingly, dotting all the i's and crossing all the t's. But the opposite is true.

Since at least the Twelfth Century, placing witnesses under oath has been a fundamental principle of justice. There are practical reasons behind this requirement. Placing a witness under oath reiterates to the witness the seriousness of the matter and their obligation to speak truthfully, without speculation or exaggeration. Placing a witness under oath ensures that the witness is bound by his testimony and faces consequences if he were to lie. Shockingly, the "witnesses" that have been cited by the House Managers as support for this impeachment were never put under oath. The so-called "investigators" who spoke to these witnesses and relayed their testimony at the four-hour hearing were themselves never put under oath. This entire proceeding is therefore premised on hearsay upon hearsay upon hearsay, containing flawed assumptions and suppositions. And on this basis, the House seeks to overturn the will of more than four million voters. This impeachment should have never been brought. This whole proceeding is contrary to Texas and federal law.

Because of the House's fatally flawed investigation, the Court should exclude all of the illegally obtained evidence that the House may try to offer against the Attorney General. Only exclusion of this evidence can ensure justice as the Court considers whether to overturn the will of the voters at the House's behest.

STANDARD OF LAW

Under the Texas Rules of Evidence, "any preliminary question about whether . . . evidence is admissible" is a decision for the Court. Tex. R. Evid. 104(a). The Court may decide to exclude evidence "by a ruling of law, a finding of fact, or both." *Pierce v. State*, 32 S.W.3d 247, 251 (Tex. Crim. App. 2000). In criminal proceedings such as this one,[1] Texas's statutory exclusionary rule expressly bars "evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America." Tex. Code of Crim. Proc. art. 38.23(a). Under Senate Rule 13, this Court has sole discretion to make all evidentiary rulings consistent with the Rules of Evidence. S. Journal, 88th Cong., 1st Sess. at 40-52 (2023).

ARGUMENT

The House's sham impeachment of the Attorney General is based on an illegal investigation that ignores the Constitution's basic concepts of justice and due process. Rather than abide by the law, the House instead conducted a secret, closed-door investigation during which "no witnesses were placed under oath." 88th Leg., R.S., Journal of the Texas House at 5636 (statement of Rep. Murr). Fundamentally, the General Investigating Committee's refusal to take witness statements under oath while clandestinely planning to impeach the Attorney General is repugnant to the Confrontation Clauses enshrined in the Texas and United States Constitutions. And the investigation blatantly violated Texas Government Code section 301.022, which expressly requires the Committee to place witnesses under oath before obtaining their testimonies.

Compounding its failures, the Committee declined to share the recordings of these unsworn statements with House Members before asking them to vote on the Articles of Impeachment.

[1] See generally the Attorney General's motion regarding his testimony.

Stunningly, the House accepted the Committee's hearsay summary of these witness statements when it preferred the Articles to the Senate. Many of these statements are still inexcusably hidden from Attorney General Paxton. This Court should avoid additional evidentiary errors by rejecting any attempts by House Managers to admit these irrevocably flawed witness statements as well as any additional evidence that was gathered as a result of these illegally obtained statements.

I. The House's Unsworn Witness Statements Violate the Texas and U.S. Constitutions.

The Texas and United States Constitutions enshrine fundamental due process rights that the House cannot disregard without consequence. Specifically, the Sixth Amendment of the United States Constitution, as applied to the states through the Fourteenth Amendment, provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amends. VI, XIV; *see also Pointer v. Texas*, 380 U.S. 400, 403, 406-07 (1965). Indeed, "[t]here are few subjects, perhaps, upon which [the Supreme Court] and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." *Pointer*, 380 U.S. at 405.

Critically, the "right of confrontation" ensured to a defendant by the United States Constitution "requires that the witness be placed under oath." *Rivera v. State*, 381 S.W.3d 710, 712 (Tex. App.—Beaumont 2012, pet. stricken) (citing *Maryland v. Craig*, 497 U.S. 836, 845-46 (1990)). After all, the "central concern" of the Confrontation Clause is "to ensure the reliability of the evidence" brought against a defendant at trial. *Id.* These rights are fundamentally important because they provide necessary "safeguards essential to a fair trial." *Pointer*, 380 U.S. at 404 (citing *Alford v. United States*, 282 U.S. 687, 692 (1931)) (internal quotations omitted). Courts have "been zealous to protect these rights from erosion." *Id.* at 405.

Texas adopted its own Confrontation Clause in article 1, section 10 of the Constitution. Tex. Const. art. 1, § 10. Like its federal counterpart, section 10 provides that a defendant "shall be confronted by the witnesses against him." *Id.* Under section 10, and through the Fourteenth Amendment, the same protections apply to Texans in State proceedings as would otherwise apply in federal proceedings under the Sixth Amendment. *See Pointer*, 380 U.S. at 406-07; *see also Rivera*, 381 S.W.3d at 713 (citing *Garcia v. State*, 151 Tex. Crim 593, 599 (1948) (op. on reh'g) ("The Sixth Amendment to the Federal Constitution . . . provides for confrontation in language not materially different to that of our State Constitution.")). Texas courts expressly recognize that the "right of confrontation *requires* that the witness be placed under oath." *Cervantes v. State*, 594 S.W.3d 667, 671 (Tex. App.—Waco 2019) (emphasis added); *see also Rivera*, 381 S.W.3d at 712. In Texas, the "giving of testimony under oath" is one of the necessary "elements of confrontation" that "can ensure that testimony is both reliable and subject to rigorous adversarial testing" before the trier of fact. *Molina v. State*, 2018 WL 3150419 at *3 (Tex. App.—Houston 2018) (citing *Craig*, 497 U.S. at 845, 851) (internal quotations omitted).

Here, the House clearly violated the Texas and federal Confrontation Clauses. The House unashamedly admitted that "no witnesses were placed under oath" during the Committee's investigation. 88th Leg., R.S., Journal of the Texas House at 5636 (statement of Rep. Murr). According to House investigators, the Committee took unsworn statements of at least "15 employees" of the Office of Attorney General, including four (David Maxwell, Ryan Vassar, Mark Penley, and Blake Brickman) who publicly filed an employment lawsuit against the agency, as well as "five senior or high-access employees." H.R. Comm. On Gen. Investigating, Hearing at 14-15 (May 24, 2023). The Committee also obtained unsworn and inadmissible statements from Margaret Moore (a Democrat District Attorney), Don Clemmer, and Gregg Cox, all of whom

worked at the Travis County District Attorney's Office in 2020. *Id.* at 15-16. Investigators also interviewed Ray Chester, an attorney for the morally fraught and longtime OAG party-opponent The Mitte Foundation, and Brian Wice, a special prosecutor working the case against Attorney General Paxton. None of these unsworn statements can reasonably be considered reliable—not only do several of the individuals interviewed have personal reasons for testifying against the Attorney General, but the necessary constitutional safeguards that protect respondent from such biased abuses were simply missing.

The House Managers suggest that their decision in this regard was correct because "[t]ypically, you do not see law enforcement or investigators place a victim or a witness under oath. That occurrence occurs at a trial." 88th Leg., R.S., Journal of the Texas House at 5636 (statement of Rep. Murr). This statement is partially true, because it is already a crime to knowingly make false statements to law enforcement in Texas; invoking the threat of perjury is therefore redundant. *See* Tex. Penal Code § 37.08. But the House's view of its role is that it acted analogously to a "grand jury." *E.g.*, 88th Leg., R.S., Journal of the Texas House at 5643. Taking this position at its face (and leaving aside the obvious historical and factual inaccuracies that are fatal to the analogy), the House still failed to follow the law. Texas law requires that all witness testimony provided to a grand jury must be under oath. Tex. Code Crim. Pro. art. 20A.256 (Witness Oath). Any evidence obtained in violation of this requirement is inadmissible. *See id.* art. 28.23.

Attorney General Paxton has the right to confront witnesses against him as guaranteed by the Texas and United States Constitutions. This right requires that any witness statements taken by the Committee be under oath. The Committee failed to observe these basic constitutional tenets, and its evidence must be rejected. The Court should exclude any statements from witnesses who were not placed under oath as constitutionally required. Otherwise, the House's deliberate

constitutional violations will go unpunished, and the protections afforded by the Constitution will be dead letter.

II. The House's Unsworn Witness Statements Violate Relevant Texas Statutory Law.

Under Texas Government Code section 301.022(a), "[a]ll legislative committees shall require witnesses to give testimony under oath." The General Investigating Committee is the *only* committee that expressly cannot waive this requirement. *Id.* § 301.022(b). The Committee has broad authority to issue subpoenas and hold violators in contempt and refer them for prosecution. *Id.* §§ 301.020(c), 301.027. But in gathering testimonial evidence, the Committee must require witnesses "to give testimony under oath, subject to the penalties of perjury." *Id.* § 301.022(a). This oath requirement "may be waived by any committee *except a general investigating committee*." *Id.* § 301.022(b) (emphasis added). The statute clearly contemplates that all witnesses—without exception—called by the Committee, its Members, or its paid investigators be placed under oath and be subject to perjury.

Yet in violation of Texas law, the Committee recommended impeachment based on third-party statements (hearsay) that were not taken under oath (hearsay upon hearsay) and subsequently summarized by House investigators (hearsay upon hearsay upon hearsay) to House Members. This kind of hearsay is, of course, generally inadmissible in courts in Texas. *See* Tex. R. Evid. 802. Moreover, the Committee never made the recordings of those interviews available to House Members. 88th Leg., R.S., Journal of the Texas House at 5637 ("[Rep. Schaefer]: Were those recordings made available to the membership of this body? [Rep. Murr]: No."). Indeed, the House provided its unauthorized witness statements to Attorney General Paxton *only after* the Court ordered it to, not in response to the Attorney General's initial disclosure request made pursuant to ordinary Texas trial practice. Even so, the House's disclosures remain incomplete. Of the

approximately twenty statements the Committee took, it provided Attorney General Paxton only nine. To date, the House is in violation of this Court's Discovery Order.

The House's unsworn statements clearly violate Texas law governing the Committee's investigatory role under section 301.022. The House may contend that this requirement does not apply to the witnesses who spoke to its investigators. But there is no textual support for this argument within the statute, which refers to all "witnesses," Tex. Gov't Code § 301.022. Instead of entertaining the House's inadmissible evidence any longer, this Court must exclude these and any other witness testimonies that violate clearly established Texas law governing evidentiary issues. Without consequences for the Committee's failure to abide by the clear and specific mandate in section 301.022, the House will have every incentive to continue violating the Government Code with impunity.

III. Because the House's Witness Statements Violate the Texas and U.S. Constitutions and Relevant Texas Law, the Statements—and Any "Fruit of the Poisonous Tree"—Must Be Excluded.

Under Texas Code of Criminal Procedure article 38.23, evidence obtained "in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America" is inadmissible. *See* Tex. Code Crim. Proc. art. 38.23(a). To the extent such evidence is wrongfully admitted at trial, the fact finder has a legal duty to disregard it. *Id.* The "primary purpose" of article 38.23 is "to deter unlawful actions that violate the rights of criminal suspects." *Miles v. State*, 241 S.W.3d 28, 31 (Tex. Crim. App. 2007); *Day v. State*, 614 S.W.3d 121, 128 (Tex. Crim. App. 2020) (noting that the purpose of the exclusionary rule is to "deter" future constitutional violations). Article 38.23 largely "mirrors the federal exclusionary rule" under the Fourth Amendment to the United States Constitution. *McClintock v. State*, 541 S.W.3d 63, 66 (Tex. Crim. App. 2017) (citing *Miles*, 241 S.W.3d at 32) (internal quotations omitted). But in article 38.23, "[t]he Texas Legislature enacted an exclusionary rule broader than

its federal counterpart." *Miles*, 241 S.W.3d at 34; *Day*, 614 S.W.3d at 128. Indeed, "the Texas statutory exclusionary rule [] affords greater protection than the federal and state constitutional provisions." *Carroll v. State*, 911 S.W.2d 210, 219 (Tex. App.—Austin 1995).

The House's violations of the Texas and United States Constitutions and Texas law demand exclusion of this evidence. The House disregarded the law protecting fundamental confrontation rights that were uniquely created to "regulate the acquisition of evidence" in proceedings just like this impeachment. *Miles*, 241 S.W.3d at 29. So while it is true that technical violations of laws unrelated to the criminal process may not form a basis for exclusion—Texas courts recognize that the underlying "law which is violated in obtaining evidence must exist for the purpose of regulating the acquisition of evidence to be used in a criminal case," *id.* at 31 (quoting *Carroll*, 911 S.W.2d at 221) (internal quotations omitted)—the constitutional and statutory provisions at issue here fall squarely within that category. *Compare Wheeler v. State*, 616 S.W.3d 858, 861-63 (Tex. Crim. App. 2021) (article 38.23 applied to exclude evidence obtained through affidavit that "was not sworn under oath as required by the Texas Constitution and Code of Criminal Procedure"), *with Miles*, 241 S.W.3d at 29 (technical violations of speed limits and "laws regulating the flow of traffic do not fall within" this category).

The consequences for illegally obtaining evidence are clear and long-standing: once the investigatory process is tainted by a constitutional violation, the exclusionary rule applies to limit the use of evidence that was gathered as a result of the illegal conduct. "[T]he exclusionary rule reaches not only primary evidence obtained as a direct result of an illegal search or seizure, but also evidence later discovered and found to be derivative of an illegality or 'fruit of the poisonous tree.'" *Segura v. United States*, 468 U.S. 796, 804 (1984) (quoting *Nardone v. United States*, 308 U.S. 338, 341 (1939)) (citing *Weeks v. United States*, 232 U.S. 383 (1914)). "It extends as well to

the indirect as the direct products of unconstitutional conduct." *Id.* (quoting *Wong Sun v. United States*, 371 U.S. 471, 484 (1963)) (internal quotations omitted). The "fruit of the poisonous tree" doctrine "affect[s] the penalty levied against the officer for engaging in unlawful [] conduct," and that penalty requires the suppression of illegally obtained evidence. *Day*, 614 S.W.3d at 128. This fundamental rule has long been recognized and applied by both the U.S. Supreme Court and the Texas Court of Criminal Appeals. *See, e.g.*, *Day*, 614 S.W.3d at 127-30; *see generally State v. Jackson*, 464 S.W.3d 724 (Tex. Crim. App. 2015); *State v. Mazuca*, 375 S.W.3d 294 (Tex. Crim. App. 2012).

When prosecutors and law enforcement gather evidence illegally, the remedy is clear: all of the ill-gotten evidence, and any other evidence that is derivative of the illegal investigation, must be excluded. Mere exclusion of the statements themselves can neither remedy the injury to the Attorney General's constitutional rights nor adequately deter future illegal conduct. Indeed, even if these statements had been taken under oath, they would not be admissible under the Senate's Rules. *See* Senate Rule 21. Accordingly, the only appropriate and adequate remedy is to exclude any and all evidence that was derived from these constitutional and statutory violations.

CONCLUSION

For the foregoing reasons, the Court should exclude the illegally obtained witnesses statements, and any evidence derived therefrom, from being used at trial.

Respectfully submitted.

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CERTIFICATE OF SERVICE

This motion was served via email on the House Board of Managers' counsel, to wit: Rusty Hardin, rhardin@rustyhardin.com, and Dick DeGuerin, ddeguerin@aol.com, on August 2, 2023.

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